The Co-Operative Central Bank Ltd v Wan Yuen Lee Enterprise Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–872 OF 1999

HASHIM YUSOFF, TENGKU BAHARUDIN SHAH JJCA AND LOW HOP BING J

1 DECEMBER 2004

Civil Procedure — Setting aside — Order for sale — Irregularities in service of originating summons and other applications — Whether there were irregularities in service — Rules of the High Court 1980 O 83 r 2(4)

By an agreement, the plaintiff agreed to grant to one Koe Swee Pow ('Koe') an overdraft facility. As security for the overdraft facility, the defendant created a third party charge over its properties in favour of the plaintiff. Upon Koe's default in the repayment of the sum disbursed, the plaintiff demanded the outstanding amount from Koe. The plaintiffs also sent a statutory notice in Form 16D ('the statutory notice') to the defendant at its registered address. Upon the defendant's failure to pay the sum demanded in the statutory notice, the plaintiff instituted proceedings by way of originating summons which was served by the plaintiff at the defendant's registered address. In the originating summons, the plaintiff sought, *inter alia*, an order for sale of the charged properties. The defendant did not enter an appearance to the originating summons and an order for sale was obtained by the plaintiff. The charged properties were successfully auctioned. The purchaser paid 10% of the purchase price. Before the balance of the purchase price could be paid by the purchaser, the defendant filed an application for, *inter alia*, an order that the default order for sale be set aside on the grounds that there was no proper/valid service of the originating summons and other applications. The High Court allowed the defendant's application to set aside the default order for sale and made other consequential orders. The plaintiff appealed to the Court of Appeal.

Held, allowing the appeal:

(1) The defendant had conceded that the originating summons had been properly served, therefore the ground alleging non-service of the originating summons for the purpose of setting aside the default order for sale was no longer an issue (see para 20 and 23).

(2) The defendant's submission was in relation to the alleged non-service of the notice of adjourned hearing and not on other applications or the subsequent applications. The Rules of the High Court 1980 ('RHC 1980') O 83 r 2(4) applies where the hearing of the originating summons has been adjourned, in which case the plaintiff must serve the notice of appointment for the adjourned hearing on the defendant not less than

two clear days before the day fixed for the hearing. In the instant appeal, there was no submission that the hearing of the originating summons has been adjourned, so as to attract the application of O 83 r 2(4) of the RHC 1980. The default order for sale was not made as a result of any adjourned hearing. That being the case, the provisions of O 83 r 2(4) of the RHC 1980 was not relevant (see para 26, 27, 28 and 29).

[**Bahasa Malaysia summary**

Melalui satu perjanjian, plaintif bersetuju untuk memberikan kepada Koe Swee Pow ('Koe') satu kemudahan overdraf. Sebagai jaminan untuk kemudahan overdraf itu, defendan telah memasukkan satu gadaian pihak ketiga ke atas hartanahnya bagi pihak plaintif. Apabila Koe gagal membuat bayaran baik jumlah yang dipinjam itu, plaintif menuntut baki tertunggak daripada Koe. Plaintif juga menghantar satu notis statutori dalam Borang 16D ('notis statutori') kepada defendan ke alamat berdaftarnya. Apabila defendan gagal untuk membayar jumlah yang dituntut dalam notis statutory itu, plaintif memulakan prosiding melalui saman pemula yang disampaikan oleh plaintif di alamat berdaftar defendan. Dalam sama pemula itu, plaintif memohon, antara lain, satu perintah jualan hartanah yang digadaikan. Defendan tidak memasukkan kehadiran untuk saman pemula dan satu perintah jualan diperolehi oleh plaintif. Hartanah yang digadaikan telah berjaya dilelongkan. Pembeli telah membayar 10% daripada harga belian. Sebelum baki harga belian boleh dibayar oleh pembeli, defendan telah memfailkan satu permohonan untuk, antara lain, satu perintah agar perintah jualan yang diperoleh kerana ketiadaan kemasukan kehadiran defendan itu diketepikan atas alasan bahawa tiada penyampaian saman pemula dan permohonan lain yang betul/sah. Mahkamah Tinggi membenarkan permohonan defendan untuk mengetepikan perintah jualan dan membuat perintah-perintah lain yang berkaitan. Plaintif telah merayu ke Mahkamah Rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Defendan bersetuju bahawa saman pemula telah disampaikan dengan betul, oleh itu alasan mengatakan tentang ketidaksampaian saman pemula bagi tujuan mengetepikan perintah jualan itu bukan lagi satu persoalan (lihat perenggan 20 dan 23).

(2) Hujah defendan adalah berkaitan pengataan kegagalan menyampaikan notis yang telah ditangguhkan perbicaraan dan bukan berhubung permohonan lain atau permohonan berikutnya. Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') A 83 k 2(4) terpakai di mana perbicaraan saman pemula telah ditangguhkan, yang mana dalam kes itu plaintif hendaklah menyampaikan notis perlantikan untuk perbicaraan yang ditangguhkan ke atas defendan tidak kurang daripada dua hari sebelum hari ditetapkan untuk perbicaraan. Dalam rayuan semasa, tiada hujah yang perbicaraan

saman pemula telah ditangguhkan, sehingga memerlukan permohonan A83 k 2(4) KMT. Perintah jualan itu tidak dibuat akibat daripada mana-mana perbicaraan yang ditangguhkan. Dalam kes begini, peruntukan A83 k 2(4) KMT tidak relevan (lihat perenggan 26, 27, 28 dan 29).]

Notes

For a case on setting aside generally, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) para 2262.

Cases referred to

Harta Empat Sdn Bhd v Koperasi Rakyat Bhd [1997] 1 MLJ 381
Koperasi Rakyat Bhd v Harta Empat Sdn Bhd [2000] 3 MLJ 81
Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor [1996] 1MLJ 374

Legislation referred to

Companies Act 1965 s 133(1)
Rules of the High Court 1980 O 32, O 83 r 2(1), (4)

Murali Achan (WM Lee with him) (K Kulasekar, Achan & Associates) for the appellant.
Asbir Kaur Sangha (Asbir, Hira Singh & Co) for the respondent.

Low Hop Bing J (delivering judgment of the court):

I APPEAL

[1] This is an appeal by the appellant/plaintiff ('the plaintiff') against the decision of the learned judge of the High Court of Malaya at Kuala Lumpur who had on 30 September 1999 made an order in the following terms:

(1) that the order dated 25 August 1988 granted in default of appearance on the part of the defendant is set aside, the charge vide presentation No 8950/86 Vol 2087 Folio 30 registered on 28 May 1986 ('the registered charge') being void and unenforceable;

(2) that the originating summons dated 26 May 1987 is dismissed;

(3) that the plaintiff return all documents of title, the subject matter of the charge, forthwith together with the duplicate charge to the defendant for presentation of cancellation of the registered charge;

(4) that the Registrar of Titles Perak Darul Ridzuan is hereby directed to cancel the memorial of the registration of the registered charge;

(5) that after cancellation of the registered charge, the Registrar of Titles Perak Darul Ridzuan do release all the issue documents of title to the defendant's solicitors, Ms Asbir, Hira Singh & Co; and

(6) that the costs of the application be paid by the plaintiff in receivership to the defendant from the assets of the plaintiff in priority to the costs of liquidation.

[2] For brevity and convenience, the aforesaid terms of the order are collectively referred to as 'the impugned order'.

II FACTUAL BACKGROUND

[3] By an agreement dated 14 May 1986, the plaintiff agreed to grant to one Koe Swee Pow ('Koe') an overdraft facility of RM9,000,000.

[4] As security for the overdraft facility, the respondent/defendant ('the defendant') created a third party charge over its properties in favour of the plaintiff. At the time of the creation of the charge, Koe was a director of the defendant.

[5] By his letter dated 8 May 1986, Koe instructed the plaintiff to disburse the monies under the overdraft facility to a company called Escalation Enterprise Sdn Bhd.

[6] By its letter dated 12 May 1986, the defendant authorised the plaintiff to disburse a sum of RM5.5 million to Escalation Enterprise Sdn Bhd, which the plaintiff did.

[7] Upon Koe's default in the repayment of the sum disbursed, the plaintiff by its solicitors' letter dated 21 November 1986 demanded the outstanding amount of RM5,843,335.87 from Koe.

[8] The plaintiff's solicitors also sent a statutory notice in Form 16D dated 21 November 1986 ('the statutory notice') to the defendant at its registered address at No 35A, 1st Floor, Jalan Hussein, 30250, Ipoh, Perak ('the defendant's registered address'). The defendant did not raise any complaint or dispute.

[9] Upon the defendant's failure to pay the sum demanded in the statutory notice, the plaintiff instituted proceedings by way of originating summons dated 26 May 1987 ('the originating summons') which was served by the plaintiff at the defendant's registered address. In the originating summons, the plaintiff sought, *inter alia*, an order for sale of the charged properties.

[10] The defendant did not enter an appearance to the originating summons and an order for sale was obtained by the plaintiff on 25 August 1988 ('the default order for sale').

[11] On 20 July 1993, the charged properties were successfully auctioned to Upaya Emas Sdn Bhd ie the applicant in Court of Appeal Civil Appeal No W–02–873 of 1999 ('the purchaser') for the sum of RM3,473,000 ('the purchase price').

[12] The purchaser paid 10% of the purchase price.

[13] Before the balance of the purchase price could be paid by the purchaser, the defendant filed an application for, *inter alia*, an order that the default order for sale be set aside on the grounds:

(a) that there was no proper/valid service of the originating summons and other applications ('Ground (a)'); and

(b) that the charge executed by the defendant was and is void and unenforceable ('Ground (b)').

[14] Pending the hearing of the said application, the defendant had obtained a stay of proceedings.

[15] On 30 September 1999, the learned judge allowed the defendant's application to set aside the default order for sale and made other consequential orders.

[16] The learned judge's notes of proceedings stated that his Lordship was bound by the decision of the Court of Appeal in the case of *Harta Empat Sdn Bhd v Koperasi Rakyat Bhd* [1997] 1 MLJ 381 which held that a charge created in breach of s 133(1) of the Companies Act 1965 ('s 133(1)') is illegal and void.

[17] On 25 March 2000, the Federal Court in *Koperasi Rakyat Bhd v Harta Empat Sdn Bhd* [2000] 3 MLJ 81 reversed the decision of the Court of Appeal in *Harta Empat Sdn Bhd*, and confirmed that no civil consequences flowed from a charge transaction which is in breach of s 133(1) ie no voidness or unenforceability attached to the loan or the charge transaction.

[18] In the light of the decision of the Federal Court, the defendant has abandoned Ground (b) but has now relied solely on Ground (a).

[19] The defendant's affidavit in support was affirmed on 10 August 1993 by one Phoon Chee Lam, a shareholder of Escalation Enterprise Sdn Bhd which in turn is a majority shareholder of the defendant. The deponent affirmed in para 4 thereof as follows:

> The *originating summons* and the subsequent applications were not served on the defendant company. The registered address of the defendant company was changed from time to time as follows: (Emphasis added.)

19 June 1987	From	No 35A, First Floor Jalan Hussein 30250 Ipoh Perak
	To	No 20 Jalan Rishah 6 Taman Rishah 30100 Ipoh, Perak
5 October 1998	From	No 20 Jalan Rishah 6 Taman Rishah 30100 Ipoh Perak
	To	No 200, Jalan Sultan Iskandar 3000 Ipoh Perak

[20] In the course of the submissions presented for the defendant, it was conceded that the originating summons has been properly served on the defendant.

III SERVICE OF ORIGINATING SUMMONS AND OTHER APPLICATIONS

[21] Although Ms Asbir Kaur Sangha, learned counsel for the defendant, has conceded that the originating summons has been properly and validly served on the defendant, she nevertheless contended that after the service of the originating summons on the defendant, the notice of adjourned hearing and all cause papers would have to be served, referring to O 83 r 2(1) and (4) and *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374 (PC).

[22] On the other hand, Mr Murali Achan for the plaintiff and Mr WM Lee for the purchaser in Court of Appeal Civil Appeal No W–02–873 of 1999 argued that the defendant's references to 'other applications' and 'the subsequent applications' were vague as they did not specify what those applications were.

[23] In our judgment, as the defendant's learned counsel has conceded that the originating summons had been properly served on the defendant, that part of Ground (a) alleging non-service of the originating summons for the purpose of setting aside the default order for sale is now no longer an issue.

[24] We shall now consider the other part of Ground (a) ie 'that there was no proper/valid service of other applications' which para 4 of the defendant's affidavit referred to as 'the subsequent applications'. It is pertinent for us to note that the submission advanced for the defendant has not specified the application or applications. With the utmost respect, in the absence of the defendant's reference to any specific application or condescending upon the specific or particular application, it is impossible for us to surmise what the applications were. In the context of the defendant's submission, we can only conceive these applications as the applications made by way of summons in chambers under O 32 or other relevant provisions of the Rules of the High Court 1980.

[25] On our part, we have perused the entire 358 page appeal record with meticulous care and found the following summonses in chambers:

Date	Page in Appeal Record	Application
10 August 1993	32–33	By defendant
25 August 1993	36–39	By the intervener for leave to intervene
21 March 1996	40–41	By the intervener for leave to intervene

[26] As alluded to above, the defendant's submission was in relation to the alleged non-service of the notice of adjourned hearing and not on 'other applications' or 'the subsequent applications'. Hence, the substratum of Ground (a) collapses.

IV NOTICE OF ADJOURNED HEARING

[27] Order 83 r2(1) and (4) relied upon by the defendant, where relevant, reads as follows:

> 2 Claims for possession: Non-appearance by a defendant (O 83 r 2)
>
> (1) Where in a charge action begun by originating summons, being an action in which the plaintiff is the chargee and claims delivery of possession or payments of moneys secured by the charge or both, any defendant fails to enter an appearance, the following provisions of this rule shall apply, and references in those provisions to the defendant shall be construed as references to any such defendant.
>
> (2) …

(3) …

(4) Where *the hearing is adjourned*, then, subject to any directions given by the court, the plaintiff must serve notice of the appointment for the adjourned hearing, together with a copy of any further affidavit intended to be used at that hearing, on the defendant not less than two clear days before the day fixed for the hearing.

A copy of any affidavit served under this paragraph must be indorsed in accordance with paragraph (3).

[28] In our view, O 83 r 2(4) applies where the hearing of the originating summons has been adjourned, in which case the plaintiff must serve the notice of appointment for the adjourned hearing on the defendant not less than two clear days before the day fixed for the hearing.

[29] In the instant appeal, there was no submission that the hearing of the originating summons has been adjourned, so as to attract the application of O 83 r 2(4). A proper perusal of the default order for sale made it abundantly clear to us that the default order for sale was not made as a result of any adjourned hearing. That being the case, the provisions of O 83 r 2(4) are not even remotely relevant. The dictum of Edgar Joseph Jr FCJ in the Federal Court explaining the effect of O 83 r 2(4) was based on the non-service of the notice of the adjourned hearing and is therefore un supportive of the contention for the defendant herein.

V CONCLUSION

[30] By reason of the foregoing grounds, we found no merit in the defendant's submission based on Ground (a). We therefore hold that the learned judge had erred in making the impugned order and in setting aside the default order for sale. Hence, we allowed this appeal with costs and affirmed the default order for sale as valid. We also made a consequential order that extension of time be given to the purchaser in Court of Appeal Civil Appeal No W–02–873 of 1999 to pay the balance of the purchase price on or before 27 May 2004.

[31] This judgment shall also apply to Court of Appeal Civil Appeal No W–02–873 of 1999 in relation to the purchaser.

Appeal allowed with costs.

Reported by Peter Ling